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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

LIVING RIVERS, Petitioner, v. DIVISION OF OIL, GAS AND MINING, Respondent, EARTH ENERGY RESOURCES, INC., Intervenor-Respondent.	**EARTH ENERGY RESOURCES, INC.'S MOTION IN LIMINE AND TO STRIKE PORTIONS OF THE PRE-FILED TESTIMONY OF ELLIOT W. LIPS AND CHARLES H. NORRIS** Docket No. 2010-027 Cause No. M/047/0090 A

Intervenor-Respondent, Earth Energy Resources, Inc. ("EER"), respectfully submits this motion in limine and to strike portions of Living Rivers' pre-hearing testimony. EER makes this motion on three grounds:

1. The issue before the Board of Oil, Gas and Mining ("Board") in this matter is whether the Division of Oil, Gas and Mining ("Division") erred in approving EER's Notice of Intent to Commence Large Mining Operations ("NOI"). Much of the pre-hearing testimony that Living Rivers has submitted, however, deals not with whether the Division erred, but with

whether a different agency, the Utah Division of Water Quality ("DWQ"), erred in granting EER permit-by-rule status on March 4, 2008. The Board lacks jurisdiction to consider whether the DWQ's March 4, 2008 determination is valid, and Living Rivers' testimony directed to that issue is irrelevant and a waste of the Board's and the parties' time and resources.

2. On February 16, 2011, one of Living Rivers' witnesses, Charles H. Norris, submitted testimony on the alleged toxicity of certain chemicals. Norris, however, lacks the qualifications necessary to render opinions on the toxicity of chemicals. According to Norris, his expertise lies in the areas of geology and hydrology. As such, Norris lacks the qualifications necessary to render opinions and conclusions on the toxicity of chemicals. The Board and the parties should not have to waste time and resources on opinions and conclusions that Norris is unqualified to render.

3. Norris' opinions and conclusions concerning the toxicity of chemicals is not only outside his areas of expertise, but it is not "rebuttal." The Board ordered, and the parties stipulated, that the testimony that Living Rivers would present by February 15 would be "rebuttal" testimony, not testimony on points that Living Rivers could have addressed in the initial pre-filed testimony, submitted on January 7, 2011. Norris' toxicity testimony is not "rebuttal" testimony, so it should be stricken.

ARGUMENT

I. LIPS' AND NORRIS' TESTIMONY THAT DWQ'S DETERMINATIONS ARE INVALID IS IRRELEVANT AND INADMISSIBLE.

The question before the Board in this matter is whether the Division erred in approving the NOI. Living Rivers' September 27, 2010 Request for Agency Action challenges the Division's decisions, not DWQ's, regarding EER's proposed mine. Obviously, DWQ decisions should be reviewed by the Water Quality Board, not this Board. Utah Admin. Code r. 317-9-3.

Much of Living Rivers' pre-hearing testimony is directed to the issue of whether DWQ erred in determining that EER's mine operation would have a *de minimis* impact on ground water quality and granting EER's operation permit-by-rule status.[1] In their February 2011 testimony, Living Rivers witnesses, Elliot W. Lips and Charles H. Norris, assert that "DWQ's March 4, 2008 determination is invalid," DWQ should have required further information before making its determination, and "DOGM should have required a new determination from DWQ based on the plan of operations that DOGM approved." (E.g., Lips' 2/15/11 Test. at 14, 23-24; Norris' 2/16/11 Test. at 9-10, 16-18, 41, 44.) In their earlier, January 7, 2011 testimony, Lips and Norris argued that "there are problems with the determination reached by the DWQ" that affect its validity. (E.g., Lips' 1/7/11 Test. at 37-38; Norris' 1/7/11 Test. at 21-25.) Lips' testimony also challenges DWQ's February 15, 2011 determination that EER's post-March 4, 2008 process changes do not alter the March 4, 2008 permit-by-rule determination. (See 2/15/11 ltr. att. as Ex. A; Lips' 2/15/11 Test. at 24-25.)

Living Rivers has always intended to appeal DWQ's determinations to this Board. In its Request for Agency Action, Living Rivers, "[r]ecognizing these issues may also be heard before the DWQ, . . . [sought] a declaratory order to clarify the proper forum to voice these concerns and the extent to which the Division must oversee the adequacy of DWQ's determinations." (Req. for Agency Action at 4 (emphasis added).) Living Rivers' request for agency action bolsters what is obvious from its pre-filed testimony: Living Rivers seeks to challenge DWQ determinations to this Board, even though the proper forum to challenge DWQ determinations is the Water Quality Board.

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[1] Any challenge by Living Rivers to such determination, which the DWQ rendered on March 4, 2008, is time-barred under Utah Admin. Code r. 317-9-2.

Challenges to DWQ's determinations have no relevance in this matter. As the agency responsible to safeguard the quality of Utah waters, DWQ's determinations (which Living Rivers has not appealed to the Water Quality Board) are entitled to deference and may be relied upon by the Division. Certainly, this Board would not entertain a mine operator's petition to *relax* or *ignore* a DWQ requirement. Thus, the above-identified testimony of Lips and Norris is irrelevant and a waste of time. It should be excluded, and Living Rivers should be precluded from presenting similar testimony during the hearing.

II. NORRIS IS UNQUALIFIED TO RENDER OPINIONS AND CONCLUSIONS CONCERNING THE TOXICITY OF CHEMICALS.

Most of Norris' February 16, 2011 testimony concerns the reliability of Material Safety Data Sheets and alleged toxicity of certain chemicals. (Norris' 2/16/11 Test. at 8-28, 39-40, 45-46.) Norris is not qualified to render such opinions and conclusions. According to Norris' January 7, 2011 testimony, his specialty areas are geology and hydrology. (Norris' 1/7/11 Test. at 2-3.) Nothing in any of Norris' testimony indicates that he has expertise in the toxicity of chemicals. Accordingly, such testimony should be stricken, and Living Rivers should be precluded from eliciting any such testimony from Norris during the hearing.

III. NORRIS' OPINIONS AND CONCLUSIONS CONCERNING THE TOXICITY OF CHEMICALS IS NOT "REBUTTAL."

Under the parties' stipulations and the Board's scheduling orders, Living Rivers had two opportunities to submit pre-hearing testimony: on January 7, 2011, and on February 15, 2011, in response to EER's February 1, 2011 expert reports. (12/21/10 Pre-Hrg. Stip. to Order for Discovery and Other Pre-Hrg. Matters at pg. 2 ¶ A; Order for Discovery and Other Pre-Hrg. Matters; 1/13/11 Stip. Mot. to Continue Hrg. and for Am. Pre-Hrg. Sched.; Stip. Order to Continue Hrg. and for Am. Pre-Hrg. Sched.) Importantly, those materials make clear that Living

Rivers' February 15, 2011 testimony must be "rebuttal" in nature. Norris' testimony concerning the alleged toxicity of chemicals is not "rebuttal," as that topic was not addressed in the reports of EER's experts.

Recognizing that Norris' toxicity testimony is not "rebuttal," Norris suggests that such testimony is the result of "new information produced by EER regarding the extraction chemical," including "a letter from EER to the United States Environmental Protection Agency (EPA) dated May 29, 2009 regarding Ja Applicability," which "included a composition of the extracting fluid." (Norris' 2/15/11 Test. at 4.) The notion that such letter was only recently provided is false. The letter that Norris identifies is part of the very NOI that is the subject of this matter. (See second letter att. to Appx. B in NOI.) That letter has been part of the public record since March 23, 2010, and it specifically identifies the "D-Limonene" component. From that identification, Norris could have found relevant Material Safety Data Sheets and other information, as he did for other chemicals. (Norris' 2/16/11 Test. at 5-7.) Norris' failure to provide his toxicity testimony with his January 7, 2011 submission cannot be blamed on "documents that were recently provided by EER." (Id. at 5.)

EER would be unfairly prejudiced by the admission of Norris' toxicity testimony. The timing of its submission prevents EER from retaining a toxicologist to prepare and submit a rebuttal. For this additional reason, Norris' toxicity testimony should be stricken.

CONCLUSION

For the above reasons, the Board should strike and preclude testimony that DWQ's determinations are invalid and regarding the alleged toxicity of certain chemicals.

DATED this 17th day of February, 2011.

HOLME ROBERTS & OWEN LLP

A. John Davis
Christopher R. Hogle
M. Benjamin Machlis
Attorneys for Earth Energy Resources, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of February, 2011, a true and correct copy of the foregoing **EARTH ENERGY RESOURCES, INC.'S MOTION IN LIMINE AND TO STRIKE PORTIONS OF THE PRE-FILED TESTIMONY OF ELLIOT LIPS AND CHARLES H. NORRIS** was served via email and by U.S. mail, postage prepaid, as follows:

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Director

February 15, 2011

Mr. Barclay Cuthbert
Earth Energy Resources, Inc.
Suite # 950
633- 6 Avenue SW
Calgary, AB T2P 2Y5 Canada

Dear Mr. Cuthbert:

Subject: PR Spring Tar Sands Project, Uintah/Grand Counties, Utah
Revised Ground Water Discharge Permit-By-Rule

The Division of Water Quality (DWQ) has reviewed the information submitted by Earth Energy Resources, Inc. (Earth Energy) on February 8, 2011 regarding planned changes to the PR Spring Tar Sands Project since DWQ's original ground water discharge permit-by-rule determination was issued on March 4, 2008. The proposed operation consists of open-pit mining of tar sands, extraction of bitumen, and storage of tailings and waste rock.

Below are the changes that Earth Energy had made to its plans for this project since the original permit-by-rule determination, including DWQ's response to each change.

1. The stabilizer component that was originally planned as part of the cleaning emulsion used for bitumen extraction will not be used. DWQ does not consider this change to affect the original finding of *de minimis* effect on ground water quality, which was made considering use of the stabilizer.

2. Earth Energy will use a horizontal belt filter to remove process water from tailings sands, and a disk filter to dewater fines. The expected water content of the blended tailings will be less than 15% by weight. The original proposal was to use a "shale shaker (or similar device)" to produce tailings with a water content ranging from 10 to 20 percent, which would not be free-draining. As the proposed change will still produce tailings within the original estimated range for water content, this change does not affect the determination of *de minimis* effect on ground water quality.

3. The original request stated that there would be two overburden/interburden storage areas approximately 25 acres each. Since then, Earth Energy has changed the storage areas for overburden/interburden from two areas of 25 acres each to two areas of 34 and 36 acres, respectively. This change does not affect our original permit-by-rule determination for having a *de minimis* effect on ground water quality.

4. The original project plan was to backfill the open pit with tailings. However, Earth Energy has determined this to be infeasible during the early stages of mine development. Earth Energy now plans to dispose of some tailings in the overburden/interburden storage area. The revised plan is to place tailings generated during the early stages of mine development within the overburden/interburden storage areas, in cells surrounded by coarser waste rock. The original permit-by-rule determination found that natural precipitation leaching through tailings would have *de minimis* effect on ground water quality. Also, proper reclamation of waste rock disposal areas would minimize any potential for increased dissolution of salts and hydrocarbons caused by the increased surface area of the broken-up rock. The proposed changes to the original plan should not affect the original determination that disposal of tailings and waste rock would have *de minimis* effect on ground water quality at this site.

In summary, the proposed changes to the mining and bitumen extraction project do not change the March 4, 2008 permit-by rule determination for having a *de minimis* potential effect on ground water quality and the project still qualifies for permit-by-rule under UAC R317-6-6.2.A(25). If any of the factors considered when making this determination change because of changes in your operation or from additional knowledge of site conditions, this permit-by-rule determination may not apply and you should inform DWQ of the changes. If future project knowledge or experience indicates that ground water quality is threatened by this operation, the Executive Secretary may require the submission of an application for a ground water discharge permit in accordance with UAC R317-6-6.2.C.

If you have any questions about this letter, please contact Mark Novak at (801) 536-4358.

Sincerely,

Rob Herbert, P.G., Manager
Ground Water Protection Section

RFH/MTN/mhf

cc: Paul Baker, DOGM
Scott Hacking, District Engineer
Dave Ariotti, District Engineer
Tri-County Health Department
Southeastern Utah Health Department

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